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Even assuming that a review of the doctrine of *in pari delicto* is in order and desirable at the present time, which respondent denies for the reasons set forth above, this is scarcely an appropriate case for a review of said doctrine because here there is no great disparity in the delictum of either party 7

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In the Supreme Court
OF THE
United States

OCTOBER TERM 1973

No. 73-183

RICHARD L. BRADLEY, *Petitioner,*

VS.

JAMES D. DOHERTY and Z. B. & M. ENTERPRISES, INC., dba THE ORCHID ROOM, *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Preliminarily, respondents express their objection to the late filing of petitioner's Petition for Writ of Certiorari. Respondents further object to the various other procedural irregularities of said Petition, as they are described in petitioner's Motion to Allow Late Filing, including submission of the Petition in an improper printed form.

Without waiving its right to object to the aforementioned irregularities, respondents respond to the Petition for Writ of Certiorari as follows:

I

BECAUSE THE DOCTRINE OF IN PARI DELICTO IS A SUBSTANTIVE DOCTRINE OF STATE LAW, THE DECISION WHETHER OR NOT TO RETAIN IT IN CALIFORNIA SHOULD BE MADE BY THE STATE COURTS AND NOT BY THIS COURT.

The main thrust of appellant's brief attacks supposed inequities inherent in the doctrine of *in pari delicto.* The great energy spent in alleging that his gambling is a compulsion and that his turpitude is consequently less severe than that of respondent, might be of interest to the state courts, but this court is concerned only with constitutional aspects of this case which are a very subordinate part of petitioner's brief.

For this court to decide, for the supposedly equitable reasons suggested by petitioner, that the doctrine of *in pari delicto* should be rejected in California, would run squarely in the face of the judicial philosophy expounded by this court in *Erie Railroad v. Tompkins,* 304 U.S. 64 (1938), wherein this court rejected the concept of a uniform federal common law. The court quoted from Mr. Justice Holmes:

> " 'The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of the State existing by the authority of that State without regard to what it may have been in England or anywhere else . . .' "

> " 'The authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word.' " (304 U.S. at page 79, quoting from *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.,* 276 U.S. 518, 532-536.)

Thus, the question as to whether or not the doctrine of *in pari delicto* is good law should not be considered here, but should be left in the hands of the California courts. In the case at bar, the California Supreme Court upheld what has long been the common law in California, and this should be dispositive of the matter.

Furthermore, in none of the federal cases cited by petitioner was the doctrine of *in pari delicto* rejected on Constitutional grounds. In *Berman v. Riverside Casino Corporation,* 323 Fed. 2d 977 (9th Circuit 1963) jurisdiction was based on diversity of citizenship and the substantive law of Nevada controlled. In that case plaintiff was not, as he is in the present case, involved in *illegal* gambling, but was gambling in a state-licensed casino. *Perma Life Mufflers v. International Parts,* 88 S. Ct. 1981 was also not decided on constitutional grounds. Suit there was brought in federal court alleging breach of the federal antitrust laws. Petitioner's constitutional arguments are, therefore, merely a smokescreen behind which he conceals a fundamentally unmeritorious claim.

II

PETITIONER'S CONSTITUTIONAL ARGUMENTS ARE INAPPOSITE WHEN APPLIED TO THE CASE AT BAR

The Fifth, Eighth, and Fourteenth Amendments to the United States Constitution have never previously been brought to bear on the issue of *in pari delicto* (appellant's brief, page 14) very simply because they have no bearing on the issue. Those Amendments expressly restrain government from interfering with citizens in certain ways; they in no way command that a state take affirmative action on behalf of any citizen. Here the refusal of the court to hear a civil action, which refusal is the direct consequence of the court's applying the doctrine of *in pari delicto,* merely leaves petitioner as the court found him. Quite contrary to having interfered with him, the state here has done nothing at all.

(a) The Equal Protection Clause of the Fourteenth Amendment (as incorporated in the Fifth) Cannot be Applied to Impose Conformity on The Substantive Law of the Various States of the Union.

Petitioner contends on page 3 of his brief that the decision of the California court, by placing itself in conflict with the laws of the states of Nevada, Kentucky, Missouri, Arkansas, Texas, Oklahoma, Louisiana, New York, and North Carolina, denies, thereby, to the citizens of California and of other states similarly situated, the equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution. The doctrine of *in pari delicto* is a doctrine of substantive state law and this plea to

enforce conformity with the substantive law of other jurisdictions, on the pretext of providing equal protection of the law, is tantamount to calling for a federally dictated, centralized body of substantive law. The equal protection clause has never previously been applied in this novel manner, and, to so apply it, would again violate the doctrine of *Erie Railroad v. Tompkins* as outlined above.

(b) The Refusal to Hear this Case by the California Courts does not Violate the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution.

Petitioner contends on pages 3 and 4 of his brief that the decision of the California court violates the due process of law guaranteed by the Fourteenth Amendment. His argument does not thereafter elaborate on this hypothesis and his theories thereunder are consequently unclear. No theory could, however, prevail because this court has never held that *inaction* on the part of a state, such as the refusal of the California courts to hear petitioner's case, can ever be arbitrary, capricious, or an abuse of discretion. This standard has heretofore been applied only to affirmative state legislative or administrative acts.

(c) Constitutional Decisions on Cruel and Unusual Punishment have Imposed no Limitations on the Doctrine of in pari delicto as Applied to the Case at Bar.

As petitioner's quotations abundantly illustrate, the cases upon which he relies deal only with the infliction of criminal punishment. The refusal of a court to hear a civil action can in no way be compared with the infliction of cruel and unusual punishment in a

criminal case, for, as noted above, the state has done nothing to petitioner other than to leave it as it found him.

Secondly, it is clear from *Powell v. Texas,* 392 U.S. 514 (1968) that neither it nor *Robinson v. California,* 370 U.S. 660 (1962) would make the punishment of gambling unconstitutional, even where the gambler was psychologically compelled to gamble. A clear distinction is made between punishing the doing of an act and punishing the "act" of merely being in a certain status. *Robinson v. California* held it unconstitutional to punish a person for being a drug addict; but the court did not object to making the *use* of narcotics by an addict illegal. It objected to the fact that "California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the state, and whether or not he has been guilty of any anti-social behavior there." 370 U.S. at 666. *Powell v. Texas* held that it was not unconstitutional to punish public drunkenness, even where the defendant was to some degree compelled to drink. In the opinion of the court, "Criminal penalties may be inflicted only if accused has committed some act, has engaged in some behavior which society has an interest in preventing . . ." 392 U.S. at 533. Furthermore, Justice Marshall for the court stated that this was the "entire thrust" of *Robinson,* as well. 392 U.S. 533.

As applied to the present case, it is clear that the state could not constitutionally punish a person for merely *being* a compulsive gambler, but that it could

punish him for engaging in gambling. Therefore, there is no constitutional limitation on the application of the doctrine of *in pari delicto* to this case.

III

EVEN ASSUMING THAT A REVIEW OF THE DOCTRINE OF IN PARI DELICTO IS IN ORDER AND DESIRABLE AT THE PRESENT TIME, WHICH RESPONDENT DENIES FOR THE REASONS SET FORTH ABOVE, THIS IS SCARCELY AN APPROPRIATE CASE FOR A REVIEW OF SAID DOCTRINE BECAUSE HERE THERE IS NO GREAT DISPARITY IN THE DELICTUM OF EITHER PARTY.

Petitioner maintains that his conduct constituted merely a violation of California Penal Code Section 330 which is a *misdemeanor,* while he maintains that respondent's conduct constituted a violation of California Penal Code Section 332, which is a *felony.* (Petitioner's brief, page 12). On page 2, line 1 of his Petition for a Writ of Certiorari, petitioner admits that the $70,000 he sought to recover was lost "in betting on the outcome of pinball games." Petitioner is therefore also in violation of California Penal Code Section 337(a), the violation of which is a *felony.* The Court of Appeal in its decision noted the applicability of California Penal Code Section 337(a) and based its decision in part on petitioner's violation of that section (see pages 5 and 8 of the Appellate Court decision, attached to petitioner's petition). Despite this fact, petitioner continues to avoid confronting the fact that the discrepancy between his

turpitude and that of respondent is more imagined than real.

For the reasons outlined above, respondents respectfully submit that petitioner's Petition for a Writ of Certiorari should be denied.

Dated, Redwood City, California,
August 15, 1973.

Respectfully submitted,
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